ted). Adopting the reasoning of the panel decision that she had authored, Judge Jones stated her view that a State could reasonably have believed "between 1996 and 1998 that it had no sovereign immunity to waive" because the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, had purported to abrogate its immunity to claims under that statute. *Id.* at 301. In her view, although "[t]he State voluntarily accepted federal funds" during that period, the purported abrogation of its immunity to ADA claims meant that "its acceptance [of federal funds] was not a 'knowing' waiver of immunity" to claims under Section 504. *Ibid.*

This Court recently denied a petition for certiorari filed by Louisiana in *Pace*. See *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005).

5. After issuing its decision in *Pace*, the en banc Fifth Circuit heard oral argument in the instant action, together with *Miller* v. *Texas Tech Health Sciences Center*, No. 02-10190, in order to consider any issues that were not disposed of in *Pace*.[1] On August 15, 2005, the en banc court issued its opinion addressing three remaining challenges to the validity of conditioning the receipt of federal funds on a state agency's waiver of immunity to claims under Section 504.

First, the court of appeals rejected the States' contention that they did not waive their immunity to suits under Section 504 because the agencies that accepted the clearly conditioned federal funds were not autho-

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[1] Although petitioners state (Pet. 7) that the instant action was consolidated with *Miller*, and the en banc Fifth Circuit refers to the appeals as "consolidated," Pet. App. 3, the instant action was never formally consolidated with *Miller*, and Texas—the state defendant in *Miller*—has not filed a petition for certiorari.

rized to waive their immunity, though they were authorized to apply for and accept the conditioned funds. Pet. App. 8-9. The court held that, by authorizing the state agencies to "accept the benefits of substantial sums of federal Spending Clause money burdened with the clearly stated condition under § 2000d-7 that acceptance waives immunity from suit in federal court" for suits under Section 504, the States effectively authorized the agencies to waive their Eleventh Amendment immunity. *Id.* at 9.

Second, the court of appeals rejected Texas's challenge to Sections 504 and 2000d-7 on "relatedness" grounds. Pet. App. 10-13. Texas argued that, because the federal funds its agency received were not funds provided directly under the Rehabilitation Act itself, the conditions in Sections 504 and 2000d-7 are not "reasonably related to the purpose of the expenditure to which they are attached" as required by the *Dole* test. See Pet. App. 10 & n.15. The court rejected that contention, holding that Congress's interest in "eliminating disability-based discrimination" in federally-funded programs "flows with every dollar spent by a department or agency receiving federal funds." *Id.* at 12 (quoting *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003)). Petitioners in the instant case did not raise a relatedness challenge in the court of appeals.

Finally, the court of appeals rejected petitioners' argument that it did not "knowingly" waive its immunity by accepting federal funds because it might have thought at the time it took the funds that it did not have any immunity to waive. Pet. App. 13-17. Although petitioners acknowledged that the en banc court had rejected the same "no knowing waiver" argument in *Pace*,

it argued that this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), required the court to reconsider *Pace*. According to petitioners, this Court in *Jackson* "repudiated th[e] 'clear statement rule' and replaced it with a 'notice' rule," under which a State will not be found to have waived its sovereign immunity based on particular conduct unless it should have known that accepting the funds would subject it to liability for engaging in that conduct. Pet. App. 14-15. The court of appeals noted that nothing in *Jackson* "can be pointed to in support of a conclusion that the Court desired to modify, much less repudiate, the well-established [clear statement] rule." *Id.* at 16. The court held instead that, consistent with long-standing precedent, the "clear and unambiguous" waiver condition in Sections 504 and 2000d-7 was sufficient to render a State's acceptance of federal funds a knowing waiver of immunity. *Ibid.*

Judge Jones, joined by five other judges, concurred in part and dissented in part. Although they agreed with the three holdings of the *en banc* court in this case, they reiterated their disagreement with the court's decision in *Pace*. Pet. App. 17-18.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court nor implicate any conflict of continuing significance with any other court of appeals. In addition, this Court recently denied certiorari in a case presenting the identical questions presented here. *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005) (No. 04-1655). There is no reason for a different result here. Further review is not warranted.

1. This Court has frequently denied petitions for certiorari raising arguments indistinguishable from those advanced by petitioners. See *WMATA* v. *Barbour*, 125 S. Ct. 1591 (2005) (No. 04-748); *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Pennsylvania Dep't of Corr.* v. *Koslow*, 537 U.S. 1232 (2003) (No. 02-801); *Hawaii* v. *Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). Moreover, on October 11, 2005, this Court denied the State's petition for certiorari in *Pace*.

On November 11, 2005, petitioners filed the instant petition for certiorari. Apart from a few minor differences in wording, the instant petition is identical to that filed in *Pace*. Compare, *e.g.*, Pet. 8-9 (Reasons for Granting the Writ) and 30 (Conclusion) with 04-1655 Pet. at 8-9 (Reasons for Granting the Writ) and 30 (Conclusion). Nothing has changed in the few months since this Court denied certiorari in *Pace* that would warrant any different result here. Accordingly, for the same reasons that the Court has previously denied further review in *Pace* itself and in cases from other circuits, and for the reasons given in the government's Brief in Opposition in *Pace*, further review is not warranted here.

2. Petitioners do not dispute that the language of Section 504 makes clear that a State agency may accept federal funds only if the State waives the agency's sovereign immunity for claims under Section 504. Conditioning receipt of federal funds on a State agency's waiver of sovereign immunity to suit under Section 504 does not

impose an unconstitutional condition on the State. See Pet. 9-18.

This Court has made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); see also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985). Cf. *Petty* v. *Tennessee-Mo. Bridge Comm'n*, 359 U.S. 275, 277, 281-282 (1959). No court of appeals—indeed, none of the appellate judges (including the concurring and dissenting judges in this case) who have questioned the applicability of Section 504 to the States on other grounds—has suggested that Section 504 is invalid as applied to the States under the reasoning of this Court's unconstitutional conditions cases. See Pet. 11 n.26 (citing appellate cases upholding Section 504 and dissenting opinions). See generally 04-1655 Br. in Opp. at 11-15.

3. Petitioners erroneously argue (Pet. 18-25) that the conditions Congress placed upon the receipt of federal funds by enacting Section 504 are unconstitutionally coercive. Although petitioners claim that the courts of appeals have adopted varying approaches to determining whether federal Spending Clause statutes are unconstitutionally coercive, the differences are largely ones of verbal formulation rather than real substance. Petitioners do not cite a single case in which a court of appeals has applied the coercion test to invalidate *any* federal statute, let alone the statute at issue in this case. This Court has consistently rejected similar challenges to other statutes. See also *Lau* v. *Nichols*, 414 U.S. 563,

569 (1974) (rejecting similar challenge to VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984) (rejecting similar challenge to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*).

This Court noted in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). In *Steward Machine* itself, however, the Court expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). Moreover, the Court in *Dole* also recognized that every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 589). As the Court explained, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 589-590). In *Dole*, the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions attached to the receipt of federal funds. *Ibid.* The same conclusion is applicable here. See generally 04-1655 Br. in Opp. at 15-17.

4. Finally, petitioners' waiver of sovereign immunity to suits under Section 504 was valid and knowing. See Pet. 25-30. The fact that petitioners may have subjectively believed that Congress had validly abrogated the State's immunity to suit under a different statute—Title II of the Americans with Disabilities Act of 1990, 42

U.S.C. 12131 *et seq.*—did not provide the State with a license both to accept federal funds clearly conditioned upon a waiver of immunity to suit under Section 504 and to deny that it had waived immunity from suit under Section 504. Since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. As in other contexts, what must be known for a valid waiver of sovereign immunity to claims under Section 504 is the existence of the legal right to be waived and the direct legal consequence of the waiver, not the practical implications or costs of waiving the right.[2] A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity it might have to suit under Section 504, regardless of whether it believed that Congress had abrogated its immunity to liability under a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a

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[2] See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986); see also *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (internal quotation marks omitted); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

claim-by-claim basis).' The State's subjective beliefs about the practical value of its immunity to suit under Section 504 are of no relevance in the analysis.[3] See generally 04-1655 Br. in Opp. at 17-23.

Petitioners err in arguing that the court of appeals' determination that the State's waiver of its immunity was knowing and voluntary conflicts with this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005). The Court held in *Jackson* that recipients of federal funds should have understood that the term "sex discrimination" in Title IX of the Education Amendments of 1992 encompassed retaliation against those who complain of violations. In reaching that conclusion, the Court reiterated the principle that recipients of conditioned federal funds may be sub-

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[3] Citing *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), petitioners contend (Pet. 28) that "[t]he Circuit Courts of Appeal are split on the proper analysis to employ in determining whether a state has notice of waiver requirements." There is no direct or continuing conflict created by *Garcia*. That case held that a State did not waive immunity to suit under Section 504 when it accepted federal funds under the mistaken belief that its immunity to suit under the ADA had been abrogated. *Garcia* was mistaken when issued, and it in any event has been effectively overridden by this Court's subsequent decisions in *Lapides* v. *Board of Regents of University System*, 535 U.S. 613, 621 (2002), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004). See 04-1655 Br. in Opp. at 21. In addition, the decision in *Garcia* essentially announced a transitional rule that is of no continuing effect; the court recognized that the State's waiver to suits under Section 504 may well have regained its full effectiveness at some point in the late 1990's, when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. See *Garcia*, 280 F.3d at 114 n.4. See also 04-1655 Br. in Opp. at 22-23. For future cases, it would appear that the Second Circuit would agree with all other circuits that acceptance of federal funds waives sovereign immunity to suit under Section 504.

ject to suits for damages for conduct in violation of a Spending Clause statute only if the recipients "had adequate notice that they could be liable for the conduct at issue." *Id.* at 1509 (quoting *Davis ex rel. LaShonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). The court of appeals faithfully applied that principle in the instant case when it held that, because the federal funds accepted by petitioners were clearly conditioned upon a waiver of petitioners' immunity, petitioners were put on adequate notice that they would not be immune to claims under Section 504 if they accepted federal funds.

Thus, the decision of the court of appeals is entirely consistent with the analysis and result in *Jackson*. In any event, *Jackson*, a Title IX case, had no occasion to consider the specific issues presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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